

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

17 Cr. 779 (KBF)

CHI PING PATRICK HO,

Hearing

Defendant.

New York, N.Y.
June 11, 2018
1:10 p.m.

Before:

HON. KATHERINE B. FORREST,

District Judge

APPEARANCES

GEOFFREY S. BERMAN

United States Attorney for the
Southern District of New York

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PAUL A. HAYDEN

Assistant United States Attorney

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Attorneys for Defendant (*Curcio*)

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EDWARD KIM

JONATHAN L. BODANSKY

JONATHAN BOLZ

1 (Case called)

2 THE COURT: Good afternoon, folks. We're here today
3 because there had been a question raised at one point, I think
4 sort of two sessions ago that related to Dr. Ho's fees being
5 paid by an entity that we're calling the "Energy Company" and
6 whether that created any kind of *Curcio* issue.

7 We proceeded as follows. I had suggested that
8 Mr. Levander -- who sort of suggested that he could do this if
9 it was necessary -- have Mr. Weinberg come in and meet with
10 Mr. Ho and discuss any issues with Mr. Ho that could or might
11 arise as a result of the payment of the fees, that that
12 independent counsel could then give Mr. Ho independent advice
13 on the issue, and that we could reconvene and discuss it
14 further.

15 That had then been done. Mr. Levander represented
16 that it had been done at the last session. So we're now ready
17 to get a report from you, Mr. Weinberg, on whether or not
18 you've, in fact, been able to meet with Mr. Ho at this point?

19 MR. WEINBERG: I have, your Honor. I've met with
20 Dr. Ho on three separate occasions and I've explained to him
21 what I believe to be the potential conflict. I've discussed
22 the matter with him, I believe, extensively and I believe we're
23 prepared to proceed with the *Curcio* hearing.

24 THE COURT: Tell me, Mr. Weinberg, do you understand
25 whether or not at this point in time, Mr. Ho is prepared to

1 waive any potential conflict? What's your understanding? I'll
2 ask him directly, but your understanding?

3 MR. WEINBERG: He believe he is, your Honor.

4 THE COURT: Do you believe, based upon what you
5 understand the issue to be, that that waiver is something that
6 as his legal advisor, you do not think is ill-advised?

7 MR. WEINBERG: I do not believe it is ill-advised at
8 all, your Honor.

9 THE COURT: Thank you.

10 Then let me talk to Dr. Ho then directly.

11 THE DEFENDANT: Of course, your Honor.

12 THE COURT: So Dr. Ho, the name *Curcio*, we call these
13 things *Curcio* hearings, because as I described at a prior
14 session -- if I didn't, I'll do it now -- it's named after an
15 individual who was a defendant in a case. So it's come to be
16 called a *Curcio* hearing because that's the name of the person
17 where this doctrine arose.

18 Now, a *Curcio* hearing arises whenever there's any
19 question about whether or not the lawyers for a defendant could
20 have any kind of either potential conflict of interest or an
21 actual conflict of interest. If there's any potential or
22 actual conflict of interest, the Court has a duty of inquiry,
23 first, to determine, first, what the parameters -- what the
24 contours of that potential conflict or actual conflict are,
25 what it's all about; and then to also inquire of the defendant,

1 ensure that the defendant understands the issue and then
2 inquire of the defendant, whether the defendant wants to waive
3 any potential conflict.

4 So let me circle back for a moment and tell you what I
5 understand the issue is and then I'm going to ask people to
6 fill in if they think there's something else.

7 First, under the Sixth Amendment of the U.S.
8 Constitution, you are entitled to, Dr. Ho, to counsel, to
9 lawyers that are free from any and every kind of conflict.
10 There are two types of duties that lawyers owe to you: A duty
11 of loyalty and a duty of confidentiality. And you are entitled
12 to counsel who are free from any conflict at all in terms of
13 their loyalty to you and that they should maintain your
14 confidences entirely, just between you and them, and not reveal
15 them to anybody else. So that conflict-free counsel is
16 something that you are entitled to.

17 And the issue that brings us here now is that the
18 energy company, which plays a role, as you know, in the
19 indictment and in the complaint, the energy company, as I
20 understand it from our discussions on the record at prior
21 sessions, may be paying or are paying your fees.

22 The question is whether or not that could, down the
23 road, lead to any issue as to whether or not the energy company
24 could be providing instructions to your lawyers. Mr. Levander
25 has said they are not, that this is not more than just the

1 common type of practice that we are all familiar with, where
2 companies often pay for their employees' lawyers, but there's a
3 question as to whether or not there was any kind of
4 instructions that either have been given or could be given --
5 Mr. Levander has said that there are not -- and also issues as
6 to whether or not potentially in communicating about any
7 finances, there could be any leakage of confidential
8 information, and/or whether there could be other communications
9 that could result in leakage of information.

10 I want to be quite clear about this. I have no reason
11 to believe that any of the counsel of record in this matter
12 would ever violate any duties that they owe you, Dr. Ho. I
13 have no reason to believe that. It's my obligation to explain
14 to you what has been raised and what could be a concern.
15 Because I can't know exactly -- nobody can really know exactly
16 how it might come up in the future, how many issues might arise
17 in the future. So that's where we are.

18 You've got this company who's named in the papers
19 relating to this criminal matter who are paying your fees and
20 we want make sure that that does not result in any way in your
21 lawyers saying or doing anything that could veer, in any way at
22 all, away from their duties, their clear duties to you.

23 Do you understand the issue?

24 THE DEFENDANT: Yes, I do, your Honor.

25 THE COURT: So describe to me what you understand the

1 issue to be. Don't talk to me about the advice you've gotten
2 from Mr. Weinberg, Mr. Levander, or Mr. Kim or anyone else.
3 Just tell me what you think the issue is so I can be sure that
4 you understand the issue.

5 THE DEFENDANT: Fine. Your Honor, I understand that
6 when the company pays for the legal fees, sometimes the lawyers
7 might listen to the company instead of representing the true
8 interests of this defendant. And when that happens, that could
9 be a potential conflict of interest.

10 THE COURT: Right. Now, at this point in time we
11 don't have any reason to believe that there is any kind of, as
12 I said, direction coming from the company or anything that has
13 created an actual conflict, but do you understand that we just
14 can't know right now how this issue could come up?

15 THE DEFENDANT: I understand. Yes, your Honor.

16 THE COURT: And do you understand if you end up
17 waiving your right to conflict-free counsel -- in other words,
18 you could choose to have lawyers where you pay for them
19 directly or pay for them in some other manner, other than
20 having the energy company pay for them, and in fact, if you
21 couldn't pay the Court would then appoint a lawyer for you who,
22 again, would be free of any of these issues.

23 Do you understand that that's a possibility?

24 THE DEFENDANT: I understand, your Honor.

25 THE COURT: Mr. Levander, can you just confirm now on

1 this transcript that you're not receiving any direction and
2 don't expect to receive any direction in terms of how to handle
3 Mr. Ho's legal representation from the company.

4 MR. LEVANDER: No problem, your Honor. I've not been
5 given, I don't anticipate getting, and I certainly would not
6 listen to any directions to represent my client other than I
7 think is appropriate to represent him. I will also further
8 state for the record, we are in the "maybe paying" as opposed
9 to "are paying" category.

10 THE COURT: I see. Thank you, sir. Then I think that
11 that then is consistent with what we had previously talked
12 about.

13 But Mr. Ho, let me go back to my question before. Do
14 you understand that there are lots of things that might come up
15 down the road? For instance, the energy company could end up
16 having a witness who could end up coming to the United States
17 who could testify against your interests? Do you understand
18 that that's a possibility?

19 THE DEFENDANT: I understand. Yes, your Honor.

20 THE COURT: And that we can't be sure how that could
21 or could not impact representation of you. Do you understand
22 that?

23 THE DEFENDANT: I understand that, your Honor.

24 THE COURT: Do you also understand that if you waive a
25 potential conflict like this, you give that issue up forever?

1 In other words, you can't raise it later on as an appeal issue
2 or any kind of trial error issue or any other kind of issue.
3 It's gone. You've waived it forever.

4 Do you understand that?

5 THE DEFENDANT: I do, your Honor.

6 THE COURT: And is anybody forcing you or requiring
7 you to waive this issue?

8 THE DEFENDANT: No, your Honor.

9 THE COURT: Has anybody from the energy company called
10 you and asked you to waive any potential conflict?

11 THE DEFENDANT: Absolutely not, your Honor.

12 THE COURT: Let me just see if there are any other
13 issues.

14 Is your mind clear right now?

15 THE DEFENDANT: Yes, your Honor.

16 THE COURT: Are you on any kind of medications
17 affecting the clarity of your thinking?

18 THE DEFENDANT: Absolutely not, your Honor.

19 THE COURT: Does any counsel have any doubt as to
20 Dr. Ho's competency.

21 MR. RICHENTHAL: I do not, your Honor.

22 MR. WEINBERG: I do not, your Honor.

23 THE COURT: Mr. Levander.

24 MR. LEVANDER: None.

25 THE COURT: The Court certainly doesn't. He's looking

1 me in the eyes. He's speaking very articulately and very
2 clearly. I certainly think he is competent to make this
3 decision. Let me just look and see if there are any other
4 issues.

5 I don't think there's anything else I need to raise.
6 Is there anything else, Mr. Richenthal that you think the Court
7 needs to before I ask the defendant his final decision?

8 MR. RICHENTHAL: No, I would make two points for the
9 record, both of which have made in prior letters on this
10 subject.

11 First, according to media reports the energy company
12 is now controlled, at least in large part, by the Chinese
13 government. So our view is when your Honor spoke of the
14 interest of the energy company, it may also be that there are
15 interests here are foreign sovereign that may or may not be
16 aligned with Mr. Ho. It may be worth confirming his
17 understanding of that as well.

18 THE COURT: I don't want to go into what he may or may
19 not understand about the ownership of the company, but let me
20 just do this.

21 Dr. Ho, I don't know who the energy company is owned
22 by. You may or you may not. I don't know. But let's assume
23 for the moment that it's owned by China or by some agency of
24 the Chinese government. Would that in any way change your view
25 as to the decision you're making on the potential conflict?

1 THE DEFENDANT: No, your Honor.

2 THE COURT: So your view is unaffected by the
3 ownership of the energy company?

4 THE DEFENDANT: Yes, your Honor.

5 THE COURT: Even if that ownership happened to be the
6 Chinese government?

7 THE DEFENDANT: Yes, your Honor.

8 THE COURT: Mr. Richenthal.

9 MR. RICHENTHAL: Then similarly, as is true with many
10 conglomerates, while we speak of the energy company, it has
11 many subsidiaries and affiliates, including U.S. incorporated
12 affiliates, which may be legally distinct, albeit colloquially
13 controlled or directed. We just ask your Honor to confirm,
14 again, that Mr. Ho's answer would not change if technically the
15 fees were flowing through, say, a U.S. subsidiary as opposed to
16 a conglomerate of a legally distinct method.

17 THE COURT: Dr. Ho, when I talk about the energy
18 company, I'm talking about the energy company and any of its
19 affiliates anywhere in the world. Is there any affiliate -- if
20 there was a U.S. affiliate or if it was an affiliate from any
21 other part of the world, would it change your position right
22 now?

23 THE DEFENDANT: It would not change my position, your
24 Honor.

25 THE COURT: All right. Anything else?

1 MR. RICHENTHAL: Nothing further, your Honor.

2 THE COURT: So Mr. Weinberg and Mr. Levander, do you
3 have any reason to believe that the defendant, again -- I've
4 asked this before of Mr. Weinberg -- should not waive any
5 potential conflict?

6 MR. WEINBERG: I have no reason to believe that, your
7 Honor.

8 THE COURT: And Mr. Levander, any reason that you know
9 of?

10 MR. LEVANDER: None.

11 THE COURT: Dr. Ho, you have the right to waive any
12 potential conflict, but it's a permanent waiver. If you end up
13 being convicted of a crime in this matter, you're not going to
14 be able to use that issue of a potential conflict in any way.

15 What is your final decision? Would you like to waive
16 any potential conflict that may result from the energy
17 company's payment of your fees or not waive?

18 THE DEFENDANT: Your Honor, I would waive.

19 THE COURT: The Court does find a voluntary and
20 knowing waiver by Dr. Ho of any potential conflict of interest
21 that may result from the energy company's payment, or potential
22 payment, of his fees in this matter.

23 Thank you, Dr. Ho. You may be seated, sir.

24 I want to thank Mr. Weinberg for taking on this
25 matter. I know you took it on quickly, I have know you have a

1 very busy practice, I very much appreciate it, and the fact
2 that you met with the defendant three times is very much
3 appreciated. So thank you.

4 MR. WEINBERG: Thank you for your comments, your
5 Honor.

6 THE COURT: Is there anything else that we should do
7 right now. I've got a lot of people here. I know that we
8 wanted to tie this up to get this issue resolved once and for
9 all. From my perspective I think we've done that.

10 Is there anything else we can usefully do?

11 MR. RICHENTHAL: No, just with respect to scheduling,
12 I think the next date on the calendar is July 12. Your Honor
13 has set that as a tentative hearing date. Our view is no
14 hearing is warranted. In any event, it probably makes sense --
15 I talked to the defense about this -- to have some sort of
16 conference for discovery or any other issues that may arise. I
17 don't know if your Honors wants to keep that date or set that
18 date. It might be a productive thing to do while we're here.

19 THE COURT: You're talking about the hearing on the
20 now fully briefed motion?

21 MR. RICHENTHAL: Yes, your Honor.

22 THE COURT: Let us keep that date for a moment. Let
23 me suggest an agenda for you folks, whether it be that motion
24 or something else, and this might be one of the times when oral
25 argument on this motion might be useful. But let me send you

1 an agenda on that and also we have the materials that are now
2 by June 30, I think going to be provided to the Court on the
3 other issue and we'll figure out then how to proceed. I think
4 it's June 30.

5 MR. RICHENTHAL: If your Honor is referring to the
6 CIPA, Section 4, that's correct.

7 THE COURT: When we decide how to deal with that
8 issue, I'd like to be very specific, if people are going to be
9 asking for certain proceedings to occur at certain locations,
10 with or without the presence of other people. Let's just be
11 had very explicit about that so we know where we're going to be
12 doing it, whether we're going to be sealing the courtroom or in
13 the robing room or how we're going to be doing it step by step,
14 because I don't want to run into issues with people not knowing
15 who's invited, who's not invited. I want everyone to know
16 exactly when things are happening, etc.

17 Anything else that we need to do. The 13th at 2 p.m.

18 MR. RICHENTHAL: I had it in my calendar as the 12th.

19 MR. LEVANDER: The 13th.

20 THE COURT: Yes, sir.

21 MR. RICHENTHAL: I don't recall if your Honor had
22 excluded time through today or through the 13th. I think it
23 was through today. We would ask in an abundance of caution
24 that it be excluded through the 13th for a variety of reasons
25 including pending motions, production of classified discovery,

1 and the CIPA motions.

2 THE COURT: I think it's automatically excluded due to
3 the pendency of the currently pending motion that's not yet
4 been resolved. Let me just take it as an application that in
5 the event that it's resolved before the 13th, that there's an
6 exclusion up to the 13th, and see whether anybody has any issue
7 with that. It may be form over substance, but let's just see
8 if you have an issue.

9 MR. LEVANDER: No, your Honor.

10 THE COURT: The Court does find that it's in interest
11 of justice to prospectively exclude time between today and
12 July 13, 2018, to allow for motion practice to be completed in
13 all respects as well as any CIPA and other issues. Those
14 interests are in the interest of justice and outweigh the
15 interest of the defendant and the public in a speedy trial.
16 That time is prospectively excluded.

17 Thank you very much, folks. We're adjourned.

18 (Adjourned)

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